

REMARKS

Claims 1-3, 6-11 and 13-20 remain in this application. Claims 1, 8, 15, and 16 have been amended to include the steps of mixing the at least one selected dye with the selected formulation chemical, packaging the mixed at least one selected dye; and dispensing the packaged dyes. Claims 4, 5 and 12 are hereby canceled without prejudice. Reconsideration and withdrawal of the current rejection is respectfully requested in view of the foregoing amendment and the remarks which follow.

Rejection of Claims 1-20 under 35 U.S.C. § 103(a)

The rejection of claims 1-20 (now 1-3, 6-11 and 13-20) under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,622,064 (issued to Bartholomew et al.) in view of U.S. Patent No. 6,980,888 (issued to Baker et al.) is respectfully traversed.

Applicant's invention provides to customers methods and apparatus for identifying a desired change to an existing hair color and substantially immediately obtaining a custom-mixed hair color formulation to achieve that change without the intervention or assistance of a trained colorist or operator. Applicant's invention has numerous benefits in retail and service environments, enabling large stocks of complex pre-mixed formulations to be replaced with a relatively small and cost-effective apparatus.

Independent claims 1, 8, 15 and 16, as hereby amended, now provide not only for (i) selecting, from a plurality of mixable dyes for altering hair color, based on the existing hair color and the desired change to the existing hair color, at least one selected dye and a selected formulation chemical for custom-mixing into a hair colorant, but also for (ii) mixing the at least one selected dye with the selected formulation chemical, packaging the mixed at least one selected dye, and dispensing the packaged dyes. These additional

steps are not set forth collectively in either of the references used by the Examiner in rejecting the claims.

Bartholomew is directed to a system for custom formulating liquid nail polish having a computer display connected to a computer controlled dispenser. See col. 3, lines 1-2. Bartholomew describes two ways for permitting a user to select a color. First, Bartholomew teaches displaying a plurality of possible pre-determined color choices to a user and permitting the user to select one the pre-determined color choices. See e.g., col. 5, lines 1-6; col. 5, lines 49-54; col. 7, lines 1-4. Second, Bartholomew teaches matching a color with a pre-existing desired color, such as through the use of a photospectrometer. See col. 5, lines 7-22.

Applicants note and the Examiner agrees that the Bartholomew machine taught is for dispensing a nail polish formulation. Bartholomew suggests that the machine could be applied to the selection and preparation of other cosmetics, at col. 2, lines 23-25, and then mentions "lip gloss, eye gel, cheek gel, creams, lotions, perfumes and the like", but it does not mention hair color. While the mechanical dispensing of a nail polish color may bear some resemblance to the mechanical dispensing of a hair treatment, Applicant submits that the two dispensing systems are not functionally equivalent because the chemistry of formulating hair colorants is substantially more complex. Nail polish is recognized in the art to be generally opaque, and substantially any nail polish color can cover any other nail polish color and provide a predictable result. In contrast, hair colorant formulations, as is known in the art, include oxidation hair dyes generally composed of intermediates (developers and couplers) and direct dyes dissolved in a stable manner in an ammonia-containing carrier mass. Hair colorant formulations are not opaque, not all color changes are obtainable, and custom formulations are more complex chemically, being based not only upon a desired color change, but also upon the existing hair color.

Accordingly, hair color dye selection and formulation cannot be construed simply as a functional equivalent to nail color formulation absent further proof of their functional equivalence. Although hair treatment solutions and nail polish may fall within the general category of a "cosmetic", they can be formulated in an attempt to achieve a variety of desired outcomes for personal or other reasons that extend well beyond a person's natural colorings. Beyond there being no functional equivalence, one of ordinary skill in the art would not have been motivated to use Bartholomew's mixing system to mix hair colorings. Customers interested in purchasing nail polish have a high probability of wanting to match their eye color or clothing selection for a given occasion. However, there is nothing to support the Examiner's assertion that such customers have any probability of also wanting hair colorings.

Baker is directed to a method and apparatus for predicting the result of a coloration of a substrate by a coloring product. More specifically, Baker is directed to a machine for predicting the result of a pre-determined and pre-packaged hair colorant on a user's hair. Baker teaches that the device works as follows: a user selects a desired pre-packaged colorant, and selects a photograph that corresponds in color to the user's existing hair color, such that the device then outputs to the user a prediction of the likely result of the pre-packaged colorant on the user's existing hair color. See e.g., col. 5, line 14 to col. 6, line 37. Further, if the user is not "totally satisfied" with the result, the user may elect to see other results, obtainable using pre-packaged colorants for which data is contained in the device, by selecting either of a "lighter" or "darker" button. See col. 8, lines 4-20.

Applicant submits that neither Bartholomew nor Baker teach or suggest receiving from the customer desired adjustments to the color, shade, and brightness of the existing hair color. Additionally, neither Bartholomew nor Baker teach or suggest visually displaying to the customer

a plurality of optional changes to the existing hair color which are derived from the desired adjustments received from the customer and obtainable through the use of a custom-mixed hair colorant.

At the outset, the Bartholomew reference is directed to nail polish, the result of which is independent of the substrate to which it is applied. The photospectrometer of Bartholomew would not work with hair, because hair color is dependent on a number of variables, such as color, shade, brightness and the like. Further, Bartholomew permits a user to select a desired color or to match a color. Bartholomew is unconcerned with the existing nail color, precisely because it is immaterial. Further, Bartholomew does not teach, suggest, or permit a user to indicate desired adjustments, and derive a plurality of optional changes in response thereto.

Baker suffers similar shortcomings. Baker is limited to predicting the results of pre-packaged hair colorants on a user's existing hair color. Baker does not teach or suggest permitting a user to input desired adjustments to color, shade, and brightness of their existing hair color. Nor does Baker teach or suggest displaying a plurality of optional color changes derived from those desired adjustments. Instead, Baker is limited to displaying the result of a pre-packaged colorant on the user's existing hair color and permitting the user to see the results of other pre-packaged colorants, according only to whether they are "lighter" or "darker".

Applicant therefore respectfully submits that it would not be obvious to one of ordinary skill in the art to combine the Bartholomew and Baker references because no combination thereof would include every element of independent claims 1, 8, 15, and 16, as amended, nor claims 2-3, 6-11, and 13-20 which depend therefrom. It would not be obvious to combine Bartholomew and Baker in the absence of impermissible hindsight. Accordingly, Applicant respectfully requests reconsideration and withdrawal

of the instant rejection of the claims under 35 U.S.C. § 103(a) based on Bartholomew in view of Baker.

CONCLUSION

It is believed that the foregoing constitutes a complete response to the Examiner's Action mailed May 30, 2008 and places this application in condition for allowance. Should the Examiner believe that an interview or other action on Applicant's behalf would expedite prosecution of the application, he is urged to contact Applicant's attorney by telephone.

Respectfully submitted,



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